

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LUC DINH PHAN,

Defendant-Appellant.

UNPUBLISHED

July 15, 2004

No. 249703

Ottawa Circuit Court

LC No. 02-026589-FC

Before: Fort Hood, P.J., and Donofrio and Borrello, JJ.

PER CURIAM.

Defendant was convicted by a jury of felony murder, MCL 750.316, with the underlying felony being that of first-degree child abuse, MCL 750.136b(2). He was sentenced to life imprisonment. Because the trial court properly admitted MRE 404(b) evidence, photographic evidence, and testimonial evidence, we affirm.

Defendant first argues on appeal that the trial court abused its discretion when it permitted the prosecution to introduce evidence of two instances where defendant allegedly abused the victim, because this evidence was offered for an improper purpose under MRE 404(b), and because this evidence's probative value was significantly outweighed by the danger of unfair prejudice. We disagree.

The admissibility of other acts evidence is within the trial court's discretion and will be reversed on appeal only when there has been a clear abuse of discretion. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998). An abuse of discretion exists only when an unprejudiced person, considering the facts on which the trial court acted, would say that there was no justification or excuse for the ruling made. *People v Rice (On Remand)*, 235 Mich App 429, 439; 597 NW2d 843 (1999). MRE 404(b)(1) provides as follows:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

To be admissible under MRE 404(b), other acts evidence generally must satisfy three requirements: (1) it must be offered for a proper purpose, (2) it must be relevant, and (3) its probative value must not be substantially outweighed by its potential for unfair prejudice. *People v Sabin (On Remand)*, 463 Mich 43, 55; 614 NW2d 888 (2000).

In the present case, all three of these elements have been satisfied and the trial court gave an appropriate limiting instruction. The prosecution offered the challenged evidence for the purpose of showing knowledge or intent. Both of these are proper purposes enumerated in MRE 404(b). Moreover, the prosecution explicitly used this evidence for these specified purposes, arguing in its closing argument that based on these prior incidents of alleged abuse perpetrated by defendant against the victim defendant intended to harm the victim, or at least had knowledge that death or great bodily harm would be the likely result of his actions.

Defendant asserts that in *People v Knox*, 469 Mich 502; 674 NW2d 366 (2004), a case that is similar in its details to the present case, the Court ruled that the admission of the defendant's past demonstration of anger and alleged/unsubstantiated child abuse only served the improper purpose of demonstrating that defendant had the bad character and propensity to harm the deceased minor child. Based on *Knox*, defendant argues that the other acts evidence in the present case was similarly inadmissible. However, we note that in *Knox, supra*, our Supreme Court's finding was based on the fact that the prosecution had failed to show relevancy on some of the prior acts, and, regarding the relevant prior acts, failed to present any evidence that the defendant had committed the alleged past abuse. *Id.*, 513. Here, the prosecution presented evidence not only that past abuse had occurred, but also that defendant was directly tied to each of those instances of past abuse. The victim's maternal aunt testified that she witnessed defendant pick up the victim by one arm causing the infant to cry, and that two weeks later she learned that the victim had a broken arm. Defendant's neighbor testified that approximately one week before the injury occurred ultimately resulting in the victim's death, defendant came to her house, asked to borrow her car, and stated the victim was not breathing. The neighbor observed defendant and the child victim alone in the home and found the victim crying, but sleepy, drooling, with a weak voice, and with his eyes rolled back in his head. Under these circumstances, and unlike in *Knox, supra*, the challenged evidence was attributable to defendant and was offered for a proper purpose.

Further, the evidence was also relevant. MRE 402 provides that all relevant evidence is admissible, except as otherwise provided by the federal or state constitutions or by the Michigan Rules of Evidence. MRE 401 defines relevant evidence as being "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Moreover, a general denial of guilt puts at issue all elements of a charged offense, regardless whether any of them are stipulated to or are specifically disputed. *Sabin, supra*, 60. To convict a defendant of first-degree child abuse, the prosecution must show that the defendant knowingly or intentionally caused serious physical or mental harm to a child. MCR 150.136b(2); *People v Gould*, 225 Mich App 79, 84; 570 NW2d 140 (1997). The prosecution in the present case was required to show that defendant either had the intent to harm the victim or that he knew that such harm was likely to occur. Evidence that defendant had previously abused the victim, including potentially shaking the victim in just the same manner as is alleged to be the cause of the victim's death, and had then recognized the need for medical attention for the child, clearly makes it more probable

than it would be without this evidence that defendant had the intent or knowledge required to commit this crime.

Defendant argues that the probative value of the challenged evidence was substantially outweighed by the danger of unfair prejudice precisely because this evidence was offered for the improper purpose of showing that defendant had a history of engaging in child abuse and therefore must have abused the victim in this instance. This Court has held that proffered evidence is unfairly prejudicial if it presents a danger that marginally probative evidence will be given undue or preemptive weight by the jury. *People v Ortiz*, 249 Mich App 297, 306; 642 NW2d 417 (2001). In the present case, the probative value of the challenged evidence was very great. This evidence, as discussed above, was highly relevant to show that defendant had the intent or knowledge necessary to have committed the charged crime. Further, this evidence appears to have been the only evidence available to the prosecution on these critical points. Accordingly, defendant has not demonstrated that the probative value of the challenged evidence was substantially outweighed by the danger of unfair prejudice. The trial court did not abuse its discretion in permitting the prosecution to introduce this evidence.

Defendant next argues that the trial court abused its discretion when it permitted the prosecution to introduce into evidence photographs of the victim's brain taken during autopsy, because these pictures were not substantially necessary or instructive to show the extent of the child's injuries, and were more prejudicial than probative. We disagree.

The decision to admit or exclude photographs is within the sole discretion of the trial court. *People v Mills*, 450 Mich 61, 76; 537 NW2d 909, mod on other grounds 450 Mich 1212 (1995). Photographs may be used to corroborate a witness' testimony. *Id.* Further, gruesomeness alone need not cause exclusion. *Id.* The proper inquiry is always whether the probative value of the photographs is substantially outweighed by unfair prejudice. *Id.* As the Michigan Supreme Court stated in *People v Eddington*, 387 Mich 551, 562-563; 198 NW2d 297 (1972):

Photographs that are merely calculated to arouse the sympathies or prejudices of the jury are properly excluded, particularly if they are not substantially necessary or instructive to show material facts or conditions. If photographs which disclose the gruesome aspects of an accident or a crime are not pertinent, relevant, competent, or material on any issue in the case and serve the purpose solely of inflaming the minds of the jurors and prejudicing them against the accused, they should not be admitted in evidence. However, if photographs are otherwise admissible for a proper purpose, they are not rendered inadmissible merely because they bring vividly to the jurors the details of a gruesome or shocking accident or crime, even though they may tend to arouse the passion or prejudice of the jurors.

In the present case, the photographs were relevant. Defendant entered a general denial of guilt placing at issue all elements of a charged offense, regardless of whether any of them are stipulated to or are specifically disputed. *Sabin, supra*, 60. Defendant was charged with felony murder, the predicate offense being first-degree child abuse. Accordingly, the prosecution was required to prove the victim died as a result of abuse perpetrated by defendant. The photographs of the brain were highly relevant because they demonstrated through visible proof that the cause

of the victim's death was an injury that occurred some months before his death in September 2002. The probative value of this evidence was not substantially outweighed by the risk of unfair prejudice. While the pathologist who conducted the autopsy on the victim could have orally testified about the information contained in the photographs, this fact alone does not make the pictures excludable. *Mills, supra*, 76. The trial court concluded, after a hearing on this point, that the pictures were not being introduced for the purpose of inflaming the minds of the jurors and prejudicing them against the accused. Accordingly, the trial court did not abuse its discretion when it permitted the prosecution to introduce the challenged photographs into evidence.

Defendant's final argument on appeal is that defendant was denied the effective assistance of counsel when trial counsel failed to object to the testimony of the victim's treating physician and his foster mother regarding the victim's quality of life between the time he left the hospital and the time of his death because this evidence was irrelevant and highly prejudicial. We disagree.

The defendant bears the burden of overcoming the presumption that counsel was effective and must meet a two-pronged test to establish ineffective assistance of counsel. *Strickland v Washington*, 466 US 668, 689; 104 S Ct 2052; 80 L Ed 2d 674 (1984). First, the defendant must show that counsel's performance was deficient as measured against objective reasonableness under the circumstances according to prevailing professional norms. *Id.*, 687-688; *People v Pickens*, 446 Mich 298, 312-313; 521 NW2d 797 (1994). Second, the defendant must show the deficiency was so prejudicial that he was deprived of a fair trial, *Strickland, supra*, 687-688; *Pickens, supra*, 309, so that there is a reasonable probability that but for counsel's unprofessional error(s) the trial outcome would have been different, *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000).

Defendant was charged with felony murder, the predicate offense being first-degree child abuse. In order to convict defendant, the prosecution was required to prove beyond a reasonable doubt that defendant committed first-degree child abuse and that the victim ultimately died as a result of that abuse. The challenged evidence was relevant because it demonstrated that the victim's injuries stemmed from the events giving rise to this case, and that no other intervening cause resulted in the victim's death. This evidence, therefore, made it more probable than it would have been without this evidence that the victim died of the injuries sustained at defendant's hands. Defendant has failed to demonstrate that the probative value of the post injury evidence was substantially outweighed by the danger of unfair prejudice. Because the challenged testimony was admissible, trial counsel's failure to object to the testimony cannot form the basis of a claim of ineffective assistance of counsel. Any objection to the evidence would have been futile, and trial counsel is not required to advocate a meritless position. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

Affirmed.

/s/ Karen M. Fort Hood

/s/ Pat M. Donofrio

/s/ Stephen L. Borrello